Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1165

THE HONORABLE THEODORE L. SENDAK,
in his capacity as Attorney General
of the State of Indiana,

Appellant

vs.

CLYDE NIHISER, d/b/a Movieland Drive-
Theater,

Appellee

Appeal from the United States District
Court for the Northern District of
Indiana, Fort Wayne Division

JURISDICTIONAL STATEMENT

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In Theater,

Appellee

Appeal from the United States District
Court for the Northern District of
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JURISDICTIONAL STATEMENT

Appellant (hereafter referred to as the State) appeals from the Memorandum of Decision and Order of the United States District Court for the Northern District of Indiana, sitting as a three-judge court pursuant to 28 U.S.C. §§2281 and 2284.

OPINION BELOW

The Memorandum of Decision and Order of the District Court has not been reported. It is set forth herein as Appendix A. The Memorandum of Decision and Order incorporates by reference an earlier Memorandum of Decision and Order overruling the State's Motion to Dismiss. Relevant portions of that Memorandum of Decision and Order, also unreported, are set forth herein as Appendix B.

JURISDICTION

Appellee (hereafter referred to as Nihiser) initated his action pursuant to the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202 and 1343 (3) and (4), and Rules 57 and 65 of the Federal Rules of Civil Procedure.

challenging the constitutionality of an Indiana statute providing a procedure whereby places in which obscene and pornographic materials are produced or exhibited would be declared a public nuisance. The Memorandum of Decision and Order appealed from was entered on November 14, 1974, which constituted a permanent injunction. Notice of Appeal was filed in the United States District Court for the Northern District of Indiana, Fort Wayne Division, on January 13, 1975.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1253, as construed in Goldstein v. Cox, 392 U.S. 471 (1970).

The Indiana statute being challenged, Indiana Code of 1971, 35-30-10.5, as added by Public Law 336 of the 1973 Acts of the Indiana General Assem-

bly, page 1874. That statute is set forth herein as Appendix D.

QUESTION PRESENTED ON APPEAL

Whether the District Court erred in refusing to abstain in a case involving a state statute which has never been construed by state courts, but rather giving that statute a strained and unrealistic interpretation which would make the statute unconstitutional.

STATEMENT OF THE CASE

The General Assembly of Indiana in 1973 enacted a statute whereby a place in which obscene and pornographic materials are exhibited may be declared a public nuisance. (See Appendix D.) On October 12, 1973, the Prosecuting Attorney for Adams County, Indiana, filed an action in

the Adams Circuit Court to declare Nihiser's establishment, which was showing the film "Deep Throat," to be such a nuisance. A subpeona duces tecum was issued for that film and other films in his possession as well as a list of titles of films which had been shown over the prior three years. Nihiser was also enjoined from removing or interfering with the personal property, specifically including films, used in the drive-in theater operation. A hearing was scheduled for October 19, 1973.

On October 18, 1973, Nihiser filed this action in federal court. The State-filed a Consolidated Motion to Dismiss and Motion to Strike. The portions thereof relevant to this appeals asserted that the case was a proper one for abstention by the federal court and that the statute

could reasonably be construed in such a manner as to be constitutional.

On June 4, 1974, the District Court entered a Memorandum of Decision and Order denying that Motion. The District Court noted that, for purposes of a Motion to Dismiss, it was not necessary to determine whether the statute was constitutional, but only whether the Complaint would be interpreted so as to present a cause of action. See Appendix B at pp. A22, A41. That Memorandum then set forth possible interpretations of the statute under which it would be unconstitutional.

On July 25, 1974, Nihiser filed a Motion for Summary Judgment, based upon the record of the case to that point. The State filed no affidavits contesting the Motion for Summary Judgment. On November 14, 1974, the

Distrfct Court entered its final judgment in the case, incorporating by reference the analysis of the statute contained in the prior Memorandum of Decision as to the Motion to Dismiss. See Appendix A at pp A3-4. The State statute was declared unconstitutional and its enforcement was enjoined. The State filed its Notice of Appeal on January 13, 1975. See Appendix C.

THE QUESTION PRESENTED IS SUBSTANTIAL

This case presents the recurring questions of federalism and comity which arise when an action is filed in a federal court challenging the constitutionality of a state statute, which action requires the construction of statutory language which has never been construed by state courts. The

particular Indiana statute in question established a new cause of action whereby the Attorney General, a local Prosecuting Attorney or any citizen of the community could bring an action against purveyors of pornographic materials under a nuisance theory. Such a nuisance action was later upheld in this Court in Paris Adult Theatre I v. Slaton, __U.S.__, 93 S Ct. 2628 (1973). The rationale of this Court as to the interests of the states in controlling obscenity amply supports such a nuisance theory. 93 S Ct. at 2635.

That statute, as is the case with the overwhelming bulk of statutes, requires judicial construction by reference to common law and general rules of interpretation to fill in

certain questions as to the application of the statute. For example, the District Court was unable to determine whether an injunction against "removing" or "interfering with" the film pending a hearing would enjoin the exhibition of the film and therefore concluded that it would have that effect.

Such a case is particularly appropriate for application of the abstention doctrine as set forth by this Court in Lake Carriers Association v. Mac Mullen, 406 U.S. 498 (1972), and Harrison v. N.A.A.C.P., 360 U.S. 167 (1959). Construction by state courts would provide an authoritative answer to questions of construction and might thus obviate certain questions or constitutionality or present

them in a significantly different light. A state court might also give a statute a limiting construction to avoid problems of constitutionality resulting from possible ambiguities in the statute.

Abstention is particularly appropriate here since the passage of the statute came shortly before this Court set forth new standards for obscenity laws in Miller v. California, __U.S.__, 93 S.Ct. 2607 (1973). That opinion further provided that state courts should be given the opportunity to construe pre-existing statutes in light of those new standards. 93 S. Ct. at 2615, fn. 6. While the Indiana Supreme Court has declined to make such a new construction concerning the criminal obscenity statutes in Mohney v. State, __Ind.__, 300 N.E. 2d 66 (1973) and Stroud v.

State, __Ind.__, 300 N.E. 2d 100 (1973), those cases may be distinguished in that they involved a statute as to which the state court had previously given a definitive construction and in that the rules of construction of criminal statutes vary from those of civil statutes. Thus, it would be appropriate to allow state courts to construe the similar language of this statute, which statute has never been construed.

What the District Court did was exactly the contrary of the policy behind the abstention doctrine. In relation to the Motion to Dismiss, the District Court sought interpretations of the statute which would make it unconstitutional. Such action is submitted to be erroneous. The Motion to Dismiss, as the modern

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equivalent of the demurrer, admits the facts of the Complaint and alleges that such facts, as a matter of law, do not state a claim upon which relief may be granted. While the district court msut consider any possible state of the facts which would allow relief. issues of law are for the court to determine as a matter of law. Thus, conclusions of law are not considered to be admitted even when alleged in the complaint as fact. 2A Moore's Federal Practice, § 12.08.

That error was compounded when the District Court then incorporated its Memorandum of Opinion on the Motion to Dismiss into its Memorandum of Decision as to the final judgment.

The District Court appeared to place some weight on the fact that the State did not file affidavits

in opposition to Nihiser's Motion for Summary Judgment. That Motion, however, did not present proper evidentiary materials as to issues of fact, but contained argumentation and allegation as to the matters of law. Thus, the State would have no reason to respond. Adickes v. Kress & Co., 398 U.S. 144 at 153-161 (1970). It should be understood that the State does not here contend that there were disputed issues of fact. The State's objection is to the result reached by the District Court. The State's position as to the District Court's allusion to the State's failure to respond is that the proper interpretation of the statute is a matter of law which should not be influenced by pleadings. The State's arguments as to issues of

law were before the District Court through the Motion to Dismiss for failure to state a claim.

The District Court's actions in refusing to abstain and then giving the statute forced and unreasonable interpretations so as to make it unconstitutional presents serious issues of federalism. It is submitted that the necessary presupposition of the District Court must have been that the courts of the State of Indiana would act in bad faith in construing Indiana statutes without regard to the provisions of the Constitutions of the United States and of the State of Indiana, which Constitutions Indiana judges have sworn to uphold. The judgment of the District Court should therefore be reversed with instructions to abstain from decision until the

statute can be construed by Indiana courts.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for plenary consideration.

Respectfully submitted,

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Assistant Attorney General

Attorneys for Appellants

APPENDIX A
DECISION OF LOWER COURT

IN THE UNITED STATES DISTRICT COURT
FOR
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATRE, Plaintiff,	)	
v.	)	CIVIL NO 73 F 93
THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana, ET AL., Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This civil rights action is before the court on plaintiff's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., filed July 25, 1974. Defendants have filed no response to

*Judge Beamer indicated an intention to approve the holding of this decision but died on October 21, 1974 before the opinion was drafted.

plaintiff's motion. For the reasons stated below, plaintiff's motion will be granted.

Plaintiff filed his complaint on October 18, 1973, seeking a temporary restraining order and temporary and permanent injunctions to restrain defendants from proceeding under Public law 336 of the 1973 Acts of the Indiana General Assembly, I.C. 35-30-10-5 (hereinafter referred to as the Indiana Nuisance Statute). The Indiana Nuisance Statute provides procedures for declaring a place which produces or displays obscene films a nuisance. Injunctive relief was sought by plaintiff under the provisions of 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1331, 28 U.S.C.A. § 1343, 28 U.S.C.A. § 2284(3) and Rule 65, Fed. R. Civ. P. Plaintiff also sought to have the Indiana

Nuisance Statute declared unconstitutional, basing jurisdiction for declaratory relief on 28 U.S.C.A. §§ 2201, 2202 and Rule 57, Fed. R. Civ. P. A three-judge court was sought pursuant to 28 U.S.C.A. §§ 2281 and 2284 and upon a finding by the court on October 19, 1973, that plaintiff's complaint presented a substantial federal question, the court requested the convening of a three-judge court. On October 29, 1973, the request was granted, and a three-judge court was designated.

On June 4, 1974, this court entered a lengthy memorandum of decision and order denying defendant's motion to dismiss this action for failure to state a claim upon which relief could be granted. In that memorandum, the court set forth the

factual background of the case and dealt at length with plaintiff's allegations and defendants contentions in response. The court held that this was not an appropriate case for abstention and dealt at length with the constitutional requirements applicable to state regulation of obscenity. This court's memorandum of June 4, 1974, setting forth the analysis and legal authorities upon which this court relies in granting plaintiff's motion for summary judgment, is now incorporated herein by reference. The facts of this case are not in dispute, and the only remaining issues are those of law. Therefore, this case is an appropriate one for disposition upon summary judgment. In determining the constitutionality of the Indiana Nuisance

Statute on plaintiff's motion for summary judgment, this court must decide (1) whether the definition of nuisance meeets the requirements of the recent United States Supreme Court rulings on obscentiy regulations, and (2) whether the procedures employed in the statute impose prior restraints.

The Indiana Nuisance Statute in Section 2 provides that a person who owns, conducts or is employed by the owner of a nuisance shall be guilty of maintaining a nuisance and shall be enjoined. Section 1 (d) provides that.

> "Nuisance" means any place in or upon which lewd, indecent, lascivious, obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting

and maintaining any such place for any such purpose

This court now holds that the words "lewd, indecent, lascivious, or obscene," as contained in the statutory definition of "nuisance," do not meet the standard of specificity set forth by the Supreme Court of the United States in Miller v California, _ U S _, 93 S Ct 2607 (1973) The Indiana Nuisance Statute makes no attempt to define the sexual conduct, depiction of which would be prohibited by the statute In adddition the definition of "nuisance" has not been authoritatively construed by the state courts in order to come within the Miller guidelines In fact, the Indiana Supreme Court has explicitly refused to so construe similar language contained in the Indiana criminal

obscenity statute, and in Mohney v State, _Ind _, 300 N E 2d 66 (1973) and Stroud v State, _Ind _, 300 N E 2d 100 (1973), held that the criminal statute was unconstitutional

Plaintiff contends that the procedures employed by the Indiana Nuisance Statute for abatement of a nuisance constitute a prior restraint on First Amendment freedoms The restraining order issued on October 12 1973, against the plaintiff was issued pursuant to Section 4 of the Indiana Nuisance Statute which provides in part

> Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and

> contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon.

An ex parte order prior to an adversary hearing and judicial determination of obscenity was approved by the Supreme Court in Paris Adult Theatre I v. Slaton, __U.S.__, 93 S Ct. 2628 (1973). However, the ex parte order approved in that case specifically provided that, although the films could not be removed from the premises until the date of the hearing, it was permissible for the owners to exhibit them and, thus, no prior restraint on exhibition existed. Under the Indiana Nuisance Statute and the order issued by the Adams County Circuit Court, which is framed in the language of the statute, the persons charged with maintaining the

nuisance is prohibited from "interfering" with the personal property and contents of the place until the hearing on the temporary injunction. "Interfering" could arguably encompass an exhibition of any and all films pending a hearing. Plaintiff asserts in support of his motion for summary judgement that he has been prohibited from exhibiting motion picture films pending an adversary hearing. Defendants have not contested plaintiff's statement. Thus, during the ten (10) days allowed by the Indiana Nuisance Statute between the time the petition for abatement of a nuisance is filed and the hearing on the temporary injunction is held, a defendant can be prevented from "interfering" with any films, even though the films may be within the protection of the First

Amendment Therefore, relying on the reasoning and authority set forth in the memorandum of decision on June 4, 1974, this court now holds that the Indiana Nuisance Statute operates as a prior restraint on First Amendment rights

As the court stated on June 4, 1974, the statute also allows injunctive and closing orders against films which are not yet in dispute, it authorizes the seizure and destruction of materials, which have not been declared obscene, by application of a prima facie evidence rule, and it authorized seizure and sale of equipment which can be utilized for protected as well as unprotected materials. Such remedial provisions encourage and allow prior restraint of materials when the nature of those materials

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has not been determined, and allow seizure of any material which can be found on the premises without any judicial determination that any particular material is obscene The statutory scheme allows seizure and destruction of presumptively constitutional materials or undeniably permitted materials merely because they are found in a place which has a reputation of exhibiting obscene films, and allows for permanent future restraint against the exhibition of materials unless the owner carries the burden of demonstrating that they are not obscene He must determine at his peril what is literally or arguably within the definition of "nuisance " Cf Baggett v Bullitt, 377 U S 360, 84 S Ct 1316 (1964) The statutory scheme directly impinges on the right to

disseminate unquestionably protected materials and allows injunction of future operations of a theater disseminating presumptively constitutional materials on the basis of the "reputation" of the theater in the past. Even if such injunctive relief were based on the obscene nature of past exhibitions, it would be objectionable, but its invalidity is even clearer in the instant action where the theater owner may be required to defend not only his showing of "Deep Throat" but any one of the movies run in the last three years, the titles of which were subpoenaed.

ORDER

Accordingly, plaintiff's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., is hereby granted.

It is considered, ordered, adjudged, and declared that the Indiana Nuisance Statute, I.C. 35-30-10.5, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. It is further considered, ordered, adjudged, and decreed that the defendants, their agents and employees, and all those acting by and through them are permanently and perpetually restrained and enjoined from enforcing or proceeding under the Indiana Nuisance Act, I.C. 35-30-10.5.

Entered this 14th day of November,

1974

/s/Luther M Swygert
Chief Judge
United States Court
of Appeals

/s/Jesse E Eschbach
Chief Judge
United States Dis-
trict Court

Judge
United States Dis-
trict Court

APPENDIX B

PORTIONS OF RULING ON DEFENDANTS' MOTION TO DISMISS NECESSARY FOR DETERMINATION OF APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER, d/b/a MOVIELAND DRIVE-IN THEATER, Plaintiff, v THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana; THE HONORABLE DANIEL C. BURRY, in his capacity as Prosecuting Attorney of the 26th Judicial Circuit, Adams County, Indiana; THE HONORABLE MYLES F PARRISH, as Judge of the Adams Circuit Court, Adams County, Indiana, Defendants.	CIVIL NO 73 F 93

MEMORANDUM OF DECISION AND ORDER

This civil rights action is before the court on defendants' consolidated motion to dismiss pursuant to Rule 12 (b)(6), Fed R Civ P , and motion to strike pursuant to Rule 12 (f), Fed R Civ P Defendants' motion will be denied.

Plaintiff filed his complaint on October 19, 1973, seeking a temprary restraining order and temporary and permanent injunctions to restrain defendants from proceeding under Public Law 336 of the 1973 Acts of the Indiana General Assembly. I C. 35-30-10.5 (herein after referred to as the Indiana Nuisance Statute) The Indiana Nuisance Statute provides procedures for declaring a place which produces or displays obscene films a nuisance. Injunctive relief was sought by plaintiff

under the provisions of 42 U.S.C.A. § 1983, 28 U.S.C.A. § 1331, 28 U.S.C.A. § 1343, 28 U.S.C.A. § 2284(3) and Rule 65, Fed. R. Civ. P. Plaintiff also sought to have the Indiana Nuisance Statute declared unconstitutional, basing jurisdiction for declaratory relief on 28 U.S.C.A. §§ 2201, 2202 and Rule 57, Fed. R. Civ. P. A three-judge court was sought pursuant to 28 U.S.C.A. §§ 2281 and 2284 and upon a finding by the court on October 19, 1973, that plaintiff's complaint presented a substantial federal question, the court requested the convening of a three-judge court. On October 29, 1973, the request was granted, and a three-judge court was designated.

The facts are not substantially disputed. On October 12, 1973, defen-

dant Daniel C. Burry, Prosecuting Attorney for Adams County, Indiana, filed a verified petition to enjoin and abate a public nuisance. On the same day, a restraining order was issued from the Adams Circuit Court by the Honorable Myles F. Parrish, also a defendant in this action. A subpeona duces tecum was issued ordering plaintiff to appear before the Adams Circuit Court and to bring with him the film "Deep Throat" along with all other motion pictures he had in his possession and a list of titles and play dates for all films exhibited over the last three years. Notice and summons to appear for a hearing on temporary injunction to abate a public nuisance requested in the petition were also issued on that

date.

* * *

Plaintiff argues that the words "lewd, indecent, lascivious, or obscene . . ." do not meet the specificity standard set forth by the Court in Miller. To counter this argument defendants point to Footnote six of the Court's opinion in Miller, supra at 2615. This footnote was a response by the majority of the Court to an argument by Mr. Justice Brennan in his dissent in Paris Adult Theatre I v. Slaton, supra at 2653, Footnote 13. Mr Justice Brennan had observed

> While the Court's modification of the Memoirs test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For under the Court's restatement, a statute must specifically enuerate certain forms of sexual conduct, the

> depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus bring them into conformity with the Court's requirements.

Mr. Justice Brennan, whose dissent was joined by Justices Stewart and Marshall, argued that under the new standards enuciated by the Court all States but Oregon would be forced to re-write their obscentiy statutes to meet the required level of specificity. The majority in Footnote Six responded: "other existing state statutes, as construed heretofore or hereafter, may well be adequate." Defendants argue that the Indiana Nuisance Statute may well be supplied with a construction meeting the required level of specificity and that the statute should not be ruled unconsti-

tutional it is argued that the statute under attack is a civil statute and need not be strictly construed. Defendants argue that the decision of the Indiana Supreme Court holding that the State's criminal obscenity statutes are unconstitutional are not applicable.

It should be noted that the majority did not challenge Mr. Justice Brennan's statement that a state statute must specifically enumerate certain forms of sexual conduct to meet the Miller requirements. The majority merely took issue with his observation that state courts will not be able to supply their obscentiy statutes with a definition of the proscribed conduct in terms sufficiently specific to comport with Miller's dictates. Therefore, plaintiff's

attack on the statutory definition of nuisance has a sound basis under Miller's standards. It is not necessary, in considering a motion to dismiss, to determine whether the Indiana Nuisance Statute is constitutional. On a motion to dismiss, pursuant to Rule 12(b((6), Fed. R. Civ. P., it is only necessary to decide whether plaintiff presents any valid claim for relief in his complaint. Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972); Jung v. K & D Mining Co., 260 F.2d 607 (7th Cir. 1958); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (1969). Defendants' arguments that plaintiff's complaint does not state a cause of action cannot be accepted. As pointed out above the Supreme Court in Miller required that state

statutes designed to regulate obscenity must be carefully limited. Id. at 2614. This requirement was not aimed only at state criminal statutes. See, Paris Adult Theatre I v. Slaton, supra. In addition, the Court in Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959), rehearing denied, 361 U.S. 950, 80 S.Ct. 399, stated that:

> Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination if ideas may be the loser. Id. at 151, 80 S.Ct. 217-218.

The new requirement that statutes dealing with obscenity must specifically describe the acts prohibited focuses on this principle. Thus, whether the Indiana Nuisance Statute is labeled as civil or criminal will

not change the requirement that the prohibited conduct must be specifically described.

The argument that the statute is not criminal and need not be strictly construed against the state will not save a constitutionally defective statute. The state can no more trammel the rights guaranteeed in the Constitution by use of civil statute that it can by use of a criminal statute. The argument that the statute need not be strictly construed because it is not criminal is of no effect in light of the express requirement set out in Miller that state statutes regulating obscentiy must specifically describe the illegal acts.

Although the Indiana Nuisance Statute provides a civil remedy, it contains many punitive features and

is couched with language indicating its quasi-criminal nature. Section 2 of the Indiana Nuisance Statute provides that:

> Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3 to 6 inclusive of this chapter. (Emphasis added).

The fact that a person can be found "guilty" of maintaining a nuisance and the fact that the statute is a part of the Criminal Code indicate its punitive nature. Also Section 8 of the Statute provides for the imposition of a tax of $300 on one against whom an injunction for maintaining a nuisance was issued. But if a person is found "innocent" or has

abated the nuisance, no such "tax" is imposed. This would indicate that the tax authorized by the statute is in the nature of a fine imposed for violating the statute. Yet the safeguards normally required in a criminal action,, including guilt beyond a reasonable doubt, are not required. The punitive nature of the statute is obvious when it can be used to fine a person, confiscate his property or terminate his business.

In Mohney v. State, __Ind.__, 300 N.E. 2d 66 (1973) and Stroud v. State, __Ind.__, 300 N.E. 2d 100 (1973), the Indiana Supreme Court held that the Indiana criminal obscentity statute was unconstitutional. The cases were before the court on remand from the Supreme Court of the United States, __U.S.__, 93 S.Ct.

3040 (1973), and __U.S.__, 93 S.Ct. 3038 (1973), for consideration in light of Miller and its companion cases. The court held that the statute was too general in nature and did not specifically set forth the sexual or obscene acts which would constitute a violation of the statute. See also, Mohney & Geraghty v. State, 38 Ind. Dec. 364 (Ind. App. 1973). The statute found in vilation of the First Amendment defined the proscribed acts in terms of "obscene, lewd, indecent or lascivious," the same words used in the Indiana Nuisance Statute. See I.C. 1971, 35-30-10-1 (Burns' Ind. Stat. Ann. § 10-2803 (1956 Repl.)]; I.C. 1971, 35-30-10-3 [Burns' Ind. Stat. Ann. § 10-2803a (1956 Repl.)]. No attempt was made by either the Indiana Supreme Court or the Appellate

Court to construe either section of the statute to impart the required specificity. Thus, the Indiana courts have had opportunities to construe the words challenged in this suit and to more specifically describe what would constitute an "obscene, lewd, indecent or lascivious" act and have declined to do so. Plaintiff's attack on the Indiana Nuisance Statute does raise substantial constitutional questions and is not subject to dismissal for failure to state a claim upon which relief can be granted.

Defendants argue that Paris Adult Theatre I v. Slaton, supra, is materially the same as the instant action and supports defendants' position. Defendants argue that in Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E 2d 712 (1971) (cited by the

United States Supreme Court in Paris Adult Theatre I) it was recognized that the state has the right to maintain an action to enjoin an existing or threatened public nuisance. Defendants argue that the Indiana Nuisance Statute is within the scope of approved state action under Paris Adult Theatre I and Miller since the statute only applies to cases involving the showing of films which come within the definition of obscene. Without reviewing the difficulties encountered in trying to determine which films come within the definition of obscene, it is clear that the Paris Adult Theatre I case and the Evans Theatre Corp. case do not dispose of the problems presented in the instant action. In Paris Adult Theatre I, the Court upheld the use of a civil injunction of

the exhibition of obscene materials even under a statute which adopts the criminal definition of "obscene materials." Paris Adult Theatre I v. Slaton, supra at 2633. The Court held that the Georgia statutory procedure did not constitute a prior restraint on First Amendment rights and that Georgia had a legitimate right to regulate commerce in obscene material and also regulate the exhibition of obscene material. However, the Court premised this holding on the provision that applicable Georgia law, as written or authoritatively interpreted by the Georgia courts complied with the newly adopted standard of specificity. The Court consequently remanded for a determination of whether the Miller standards were met.

It is clear that the Paris Adult Theatre I case and the Evans Theatre Corp. case support defendants' arguments that a state can regulate the dissemination of obscene materials by the use of civil injunctions. However, it is not questioned that a civil remedy of this nature can be used to combat obscenity provided constitutional safeguards are met. But this is not an issue in this case. The questions presented in the instant action is relation to the statute are (1) is the definition of "nuisance" sufficiently specific under Miller standards and (2) do the procedures employed in the statute violate due process or impose prior restraints? The first question was not answered by the Supreme Court in Paris Adult TheatreI. The second question was

presented in Paris Adult Theatre I, but the Georgia statutory procedure was much different than that utilized in the Indiana Nuisance Statute. Thus, it is not at issue whether Indiana can regulate obscenity by enjoining the proscribed activity. What is at issue is whether the definition of prohibited acts and procedures authorized to remedy a violation are proper under First, Fifth and Fourteenth Amendment standards. Defendants' arguments fail to convince this court that no valid claim or issue is presented.

III.

On October 12, 1973, a restraining order was issued by the Adams Circuit Court ordering plaintiff and anyone else who claimed any ownership rights, title or interest in the motion picture

film entitled "Deep Throat" to refrain from

> "removing or in any way or in any manner interfering with any of the personal property, film or films or contents of the location known as Movieland Drive-In Theatre until the date of the hearing on the temporary injunction "

This order was posted with the admonition that its removal or mutilation was punishable by contempt of court

This restraining order was issued pursuant to Section 4 of the Indiana Nuisance Statute which provides in part:

> Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon

This section also requires the officer who serves the order to make and return into court an inventory of the personal property and contents situated and used in conducting or maintaining such nuisance.

Plaintiff argues that an order of this type violates his First and Fourteenth Amendment rights in that it constitutes an illegal prior restraint on the exercise of those rights. Defendants contend that the issuance of an order of this type prior to an adversary hearing and judicial determination on the merits of the obscenity issue is not in violation of any constitutionally protected rights and is a procedure approved by the United States Supreme Court in Paris Adult Theatre I v. Slaton, supra. However, this case

does not support defendants' argument. The ex parte order approved in Paris Adult Theatre I specifically provided that, although the films could not be removed from the premises until the date of the hearing, it was permissible for the owners to exhibit them and, thus, no prior restraint on exhibition existed. Under the Indiana Nuisance Statute and the order issued by the Adams County Circuit Court, which is framed in the language of the statute, the person charged with maintaining the nuisance is prohibited from "interfering" with the personal property and contents of the place until the hearing on the temporary injunction. Whether "interfering" could encompass an exhibition of the film is not clear. Plaintiff is entitled to show that

the statute could be used to prohibit exhibition prior to an adversary hearing on the obscenity issue. Defendants are not entitled to dismissal since plaintiff does not present a valid attack on Section 4 of the Indiana Nuisance Statute. See, Pursue Ltd. v. Huffman, No. C 72-432 (N.D. Ohio W.D. April 20, 1973).

Plaintiff relies on Pursue Ltd. v. Huffman, supra, in support of his argument that this action to abate a nuisance under the Indiana Nuisance Statute constitutes a prior restraint on his First Amendment rights. In Pursue the court was presented with a constitutional attack on three sections of the Ohio Nuisance Statute, O.R.C. §§ 3767.01, et seq., which are almost identical to corresponding sections of the Indiana Nuisance Statute. The court held that the

definition of "nuisance" in O.R.C. § 3767.01(C) as "any place in or upon which lewd, indecent, lascivious or obscene films . . . are . . . exhibited" afforded adequate protection to constitutional rights. However, this decision was reached before Miller, and its continued vitality under the new constitutional standards is questionable.

The Pursue court also held that O.R.C. § 3767.04 was unconstitutional insofar as it authorizes the state courts to close theatres without a prior adversary hearing on the obscenity question. That section of the Ohio Nuisance Statute, which in material respects is identical to Section 4 of the Indiana Act, has provided that, if, at the time the temporary injunction is used, and unless the owner of the

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nuisance shows that it is abated, an order shall issue closing the place for any purpose of lewdness, etc. Thus, plaintiff argues that the Pursue decision supports its position that the Indiana statute is unconstitutional because it provides remedies which can be used and are being used as a restraint on plaintiff's First Amendment rights. Defendants deny that Section 4 authorized unconstitutional procedures and state that no prior restraints are imposed because a hearing is provided prior to the issuance of a tempoary injunction.

Any system of prior restraints on expression comes before the court bearing a heavy presumption against its constitutional validity. Bantam Books Inc. v. Sullivan, 372 U.S. 58,

70, 83 S Ct. 631, 39 (1963). However, the protection against prior restraints is not unlimited and where obscene matters are involved an exception to an absolute ban on prior restraints exists. Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625 (1931); Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325 (1957). But any restraint on First Amendment rights is tolerated only where it operates under judicial supervision where the defendant can be assured of an almost immediate judicial determination of the validity of the restraint. Bantam Books Inc. v. Sullivan, supra, at 70, 83 S Ct. 639. See also, Kingsley Books Inc. v. Brown, supra. The Fourteenth Amendment requires that regulation by the states of obscenity must conform to procedures

which will safeguard constitutionally protected expression. Bantam Books Inc. v. Sullivan, supra. Regulations of obscenity must scrupulously embody the most rigorous procedural safeguards. Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959); Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708 (1961). Therefore,

> [a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.

Freedman v. Maryland, 380 U.S. 51, 59, 85 S.Ct. 734, 39 (1965).

Section 4 of the Indiana Nuisance Statute is challenged in the instant action because it is alleged not to provide the procedural safeguards mandated by the Supreme Court. In Pursue Ltd., supra, similar provisions

were ruled unconstitutional if they operated to allow closing a theater without a prior adversary hearing on obscenity. In Kingslev Books v. Brown, supra at 1328, the court stated that it is necessary to look at the operation and effect of the staute in order to determine whether it affects a prior restraint. Plaintiff has the right to prove that the operation of Section 4 of the Indiana Nuisance Statute will create a prior restraint on protected rights. For this reason his claim cannot be dismissed.

The court in Pursue Ltd., supra, held that O.R.C. § 3767.06 was unconstitutional. This statute provided that upon a determination that a nuisance existed on a given premise, the court could order the premises closed for

any purpose for a period of one year unless the owner obtains a release from such order by demonstrating that the nuisance has been abated. Section 6 of the Indiana Nuisance State is similar to O.R.C. § 3767.06 except that it does not allow closing the place "for any purpose" but only for further maintaining the place as a nuisance. Although the Pursue Ltd. court focused on the language "for any purpose," the court also stressed the fact that the statute made no provision for a hearing on any of the films which the owner intended to show during the one year period. The Indiana statute only enjoins maintaining the place as a nuisance but it does not provide for any hearings to determine whether films which the owner may have proposed to exhibit

during the year enjoined were protected by the First Amendment. Instead, the statute puts the burden on the owner to prove that he has abated the nuisance, and of persuading the courts that the movies he plans to show are protected by the First Amendment. But the First Amendment demands that the Government must assume this burden. Blount v. Rizzi, 400 U.S. 410, 18, 91 S.Ct. 423, 29 (1971). The infirmity of this Section of the Indiana Nuisance Act is summarized by the Pursue court's description of the defects in O.R.C. § 3767.06:

> . . . upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this Section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden falling on the owner to come into court and prove the non-obscenity of any such other

films.

Although the Indiana Nuisance Statute in Section 6 does not allow closing the theater for all purposes, it will have such an effect unless it is determined beforehand what films the exhibitor proposes to show during that year will not constitute a nuisance. The statute leaves the burden on the exhibitor to seek judicial approval for each film. Thus, the Pursue Ltd.1 decision does raise questions concerning prior restraints which plaintiff has a right to argue apply equally to the Indiana Nuisance Statute. Dismissal of the action would deprive him of this opportunity and it is unwarranted.

1The United States Supreme Court has granted review of this case. The Court presumably will review the constitutionality of the Ohio Nuisance Statute and will also review the abstention issue. Huffman v. Pursue Ltd., 42 U.S.L.W. 3517 (1974)

In summary, plaintiff presents sufficient legal questions to state a cause of action and avoid dismissal under Rule 12(b)(6). The definitional sections of the statute are properly challenged in light of the Miller standards. It is also arguable that many of the procedures authorized by the statute can be used to effectuate prior restraints on First Amendment rights or deny due process. Plaintiff does state a claim upon which relief can be granted.2

IV.

Defendants argue that this action is one in which the federal court should abstain in order to allow the Indiana court to interpret the statute. It is argued that construction of the statute may eliminate some of

its unclarity and perhaps avoid the constitutional question. Although defendants' argument presents a difficult question for the court, this case is not a proper one in which principles of comity require abstention by this court.

It is a clearly established principle that the federal courts are charged with the primary duty of vindicating federal rights. Escalera v. New York City Housing Authority, 425 F.2d 853, 865 (2nd Cir. 1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54 (1970). The federal courts have a duty to hear cases which Congress has extended jurisdiction of to the courts unless an exception to the exercise of that jurisdiction exists. Federal Savings and Loan Ins. Corp. v. Krueger, 435 F.2d 633, 37 (7th

Cir. 1970). One such exception is the so called abstention doctrine which was set forth in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643 (1941). The doctrine requires that when a federal court is presented a controversy which involves unsettled questions of state law, the federal court should defer decision on the federal question until the state court has had a reasonable opportunity to construe or interpret the state law. See, Railroad Comm'n of Texas v. Pullman Co., supra; England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461 (1964); Pell, Abstention A Primrose Path by Any Other Name, 21 DEPAUL L. REV. 931, 32 (1972). The paradigm case for abstention is one where a contruction by the state

courts of the challenged statute could avoid or modify the federal constitutional question. Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 92 S.Ct. 1749, 1757 (1972): Harrison v. N.A.A.C.P., 360 U.S. 167, 76, 79 S.Ct. 1025, 1030 (1959).

In Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151 (1972), the court held that the Anti-Injunction Statute, 28 U.S.C.A. § 2283 does not prohibit a federal court from enjoining state court action pursuant to provisions of the Civil Rights Act, 42 U.S.C.A. § 1983. However, the court pointed out that the holding in the case did "not question or qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state proceeding.

Id. at 2162. In the concurring opinion of Mr. Chief Justice Burger, in which Justices White and Blackmum joined, it was stated that these principles of equity, comity and federalism in the context of the pending state criminal proceedings allow a federal court to issue an injunction in only a narrow set of circumstances. It was then stated that the Court has not yet reached the question of how great a restraint is imposed on a federal court by these principles when asked to enjoin state civil proceedings. Id. at 2163.

Considerations of comity are less compelling in a civil case in that the offense to state interests is less extensive. See Younger v. Harris, 401 U.S. 37, 55, 91 S.Ct. 746, n. 2 (1971) (concurring opinion

of Justice Stewart); Cousins v. Wigoda, 463 F.2d 603 (7th Cir. 1972), appeal denied, 409 U.S. 1201, 92 S.Ct. 2610.

However, the burden on the individual plaintiff is also less severe when left to his state court remedies, and the disruptive effect on federalism is not dissipated. See Lynch v. Snepp, 472 F.2d 769, 774, n.5 (4th Cir. 1973). Moreover, attempts to enforce civil provisions such as the one here may be characterized as civil proceedings utilized to enforce the criminal laws and thus subject to Younger in any event. See Palaio v. McAuliffe, 466 F.2d 1239 (5th Cir. 1972); Speight v. Slaton, 356 F.Supp. 1101 (N.D. Ga. 1973), vacated, 42 L.W. 4300 (1974). The best approach is not to regard labels "civil" and

"criminal" as controlling, but to analyze the competing interests which each case presents. See Palaio, supra at 1233. In any case, a federal court should stay its hand when a single suit would be adequate to protect the rights asserted. If the federal court is to intervene, it should plainly appear that such a course would not afford adequate protection. Younger, supra at 44-45, 91 S.Ct. at 750-751.

In Younger v. Harris, supra, the court held that a federal court cannot enjoin a state criminal action even if the state statute upon which the criminal action is based is attacked as being unconstitutional on its face, and having a chilling effect on constitutional rights. The court did, however, leave room for federal injunctive relief in a pending state

action in certain exceptional circumstances where "the danger or irreparable injury is both great and immediate," 401 U.S., at 45, 91 S.Ct., at 751 or where state law is "flagrantly and patently violative of express constitutional prohibitions," 401 U.S., at 53, 91 S.Ct., at 755, or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances" calling for equitable relief. 401 U.S., at 54, 91 S.Ct., at 755. The Court stated that:

> Certain types of injury, in particular the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a simple criminal prosecution.

Taken alone, the fact that plaintiff faces possible sanctions in the state court proceeding is no foundation for holding that the threat to federal rights is one which cannot be eliminated by defense in a single state court proceeding. A civil proceeding to determine the obscenity of certain materials, even when it involves a preliminary injuctive procedure, amounts to no more of a prior restraint than a criminal prosecution. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325 (1957). Accordingly, any threat which the proceeding invokes is not inevitably one which cannot be eliminated through defense in a single proceeding, regardless of any "chilling effect" which may occur as a result. See Byrne v. Karalexis, 401 U.S. 216, 220, 91 S.Ct.

777, 779-80 (1971). Nor is defense in a single proceeding insufficient because the statutory scheme is susceptible to invalid applications. See Younger, supra at 47, 91 S.Ct. at 752 n. 4. However, in the instant action the issue of obscenity will be decied in an in rem proceeding brought in equity to abate a nuisance. Certain criminal protections must necessarily be lost by the use of civil proceedings to enforce the criminal code. See Speight v. Slaton, supra at 1105 (dissenting opinion). While this by itself does not make a state court remedy inadequate to protect constitutional rights, it certainly is an important relevant factor to consider in balancing the disruptive effect on federalism which may result if this court should provide

injunctive relief against the harm which may be suffered by the plaintiff. In short, it is significant when considering whether "unusual circumstances" exist in this case which would fit it into an exception to Younger.

There are several other reasons why intervention in this case is appropriate. The statutory scheme here is arguably in several respects "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Watson v. Buck, 313 U.S. 387, 402 61 S.Ct. 962, 967 (1941). The prima facie rule is clear and subject to no limiting construction, and thus no state court construc-

tion could eliminate the issue presented. It not only places unwarranted burdens in the way of challenges to the application of the definitional sections of the statute but allows restraint of materials without a judicial determination of the alleged obscenity of the materials and without placing the burden of proof upon the censor. See Freedman, supra at 58, 85 S.Ct. at 739 (burden of proof); Teitel Film Corp. v. Cusack, 390 U.S. 139, 141, 88 S.Ct. 754, 756 (1968) (judicial determination of obscenity.)

Moreover, the remedy provisions provide that upon entry of a final injunction, an order "shall direct the removal from the place of the personal property and contents used in conducting the nuisance," shall direct the sale of such thereof as

belong to the defendants," and that even though obscene materials as defined in the statute "shall be confiscated and destroyed," a closing order shall remain in effect for one year unless the owner of the property furnishes a bond and proves his innocence of any knowledge of the use of the property and that he could not with reasonable diligence have known such use. "Every defendant in the action is presumed to have had knowledge of the general reputation of the place." I.C. 35-30-10.5-6.

In addition, Section 5 of the statute provides that in the action for a temporary injunction to close the establishment until a hearing on the permanent injunction can be had:

> "evidence of the general reputation of the place . . . is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining the nuisance." (Emphasis added).

"Personal property" as defined in the statute includes "all mechanical equipment used for . . . projection or viewing [obscene films.]" I.C. 25-30-10.5-1. Unlike a criminal charge, the nuisance abatement procedures shift the burden to the owner to prove that his place is not a nuisance when there is evidence that the general reputation of the place is that it is a nuisance. Similarly, if the place is closed for one year under Section 6, the owner again has the burden of showing that he no longer maintains a nuisance or has abated

it.

The statute also allows injunctive and closing orders against fils which are not yet in dispute since those in dispute must be destroyed; it authorized the seizure and destruction of materials which have not been declared obscene by application of the prima facie evidence rule, and it authorizes seizure and sale of equipment which can be utilized for protected as well as unprotected materials. Such remedial provisions encourage and allow prior restraint of materials when the nature of those materials has not been determined and allow seizure of any material which can be found on the premises without any judicial determination that any particular material is obscene. The statutory scheme allows seizure

and destruction of presumptively constitutional materials or undeniably permitted materials merely because they are found in a place which has a reputation of exhibiting obscene films and allows for permanent future restraint against the exhibition of materials unless the owner carries the burden of demonstrating that they are not obscene. He must determine at his peril what is literally or arguably within the definition of "nuisance." Cf. Baggett v. Bullit, 377 U.S. 360, 84 S.Ct. 1316 (1964). Under such circumstances, federal intervention is not only allowable, but compelled. See Speight, supra at 1104-1105 (dissenting opinion). The stautory scheme directly impinges on the right to disseminate unquestionably protected materials and allows

injunction of future operations of a theater disseminating presumptively constitutional materials on the basis of the "reputation" of the theater in the past. Even if such injunctive relief were based on the obscene nature of past exhibitions, it would be objectionable, but its invalidity is even clearer in the instant action where the theater owner may be required to defend not only his showing of "Deep Throat" but any one of the movies run in the last three years, the titles of which were subpeonaed. See Speight, supra at 1107 (dissenting opinion).

We agree with Judge Morgan in Speight that the state has no right to seize and destroy protected materials (here, the projection equipment and materials which have been found obscene based on the reputation of the place)

merely because they are found in conjunction with unprotected materials. Nuisance procedures such as these are attempts to circumvent the criminal requirements of jury verdicts requiring proof beyond a reasonable doubt and civil proceeedings to determine the obscenity of specific materials. Such attempts at abatement can never be constitutionally permissible under any reasonable contruction of the statute because they directly impinge on the dissemination of constitutionally protected materials never adjudicated obscene. See Speight, supra at 1108-1109 (dissenting opinion).

Finally, the definitional section of the statute is flagrantly and patently in violation of express constitutional guarantees, given the refusal of the Indiana Supreme Court

to construe similar language in the corresponding criminal provisions. See Mohney v. State, __Ind.__, 300 N.E. 2d 66 (1973); Miller v. California, __U.S.__, 93 S.Ct. 2607 (1973).

Both the Indiana Supreme Court and the Indiana Court of Appeals have been given a reasonable opportunity to construe the language used to define a nuisance but have declined to give it the specificity mandated by Miller. In Mohney v. State, supra, on remand from the Supreme Court of the United States to the Indiana Supreme Court for reconsideration in light of the recent obscenity cases in the Indiana Supreme Court stated:

> [t]he main thrust of those opinions so far as applicable to this case, is that the statute under which appellant was convicted

> is unconstitutional for the reason that it is too general in nature and does not set out specifically the sexual or obscene acts which, when depicted in any of the media named by the statute, constitute a violation of the statute.

The Court held that I.C. 1971, 35-30-10-3 [Burns' Ind. Stat. Ann. § 10-2803a (1956 Repl.)] was unconstitutional. That statute made it a violation to send into this state "any obscene, lewd, indecent or lascivious literature" etc. These are the exact words used to define a "nuisance" in the Indiana Nuisance Statute. The Indiana Supreme Court has found these words to be insufficiently specific under Miller and has refused to construe them. In Stroud v. State, supra, the statute, I.C. 1971, 35-30-10-1 [Burns' Ind Stat Ann. § 10-2803 (1956 Repl.)] was found to be unconstitutional for the same reasons stated

in Mohney. The statute in Stroud also used the words "obscene, lewd, indecent or lascivious" and again the court refused to construe them. See also, Mohney and Geraghty v. Indiana, supra. Thus, it cannot be contended that the Indiana courts have not had a reasonable opportunity to construe the words "lewd, indecent, lascivious and obscene" which form the foundation of the Indiana Nuisance Statute.

For the reasons given, this case presents sufficient "unusual circumstances" which warrant the court in declining to abstain from deciding the issues presented.

* * *

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Defendants' motion to dismiss for failure to state a claim upon which relief can be granted or because the court is required to abstain from hearing this case is denied. The defendants' motion to strike is also denied.

Entered this 4th day of June, 1974.

/s/Luther M. Swygert
Chief Judge,
United States Court
of Appeals

/s/George N. Beamer
Chief Judge,
United States District Court

/s/Jesse E. Eschback
Judge,
United States
District Court

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

CLYDE NIHISER d/b/a Movieland Drive-In Theater,	)	Filed January 13, 1975 Francis T Grandys, Cl Clerk
Plaintiff,	)	
vs.	)	CIVIL NO. 73 F 93
THE HONORABLE THEODORE L. SENDAK, in his capacity as Attorney General of the State of Indiana, et al.,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that defendant Theodore L. Sendak, Attorney General of Indiana, hereby appeals to the United States Supreme Court, pursuant to 28 U.S.C. § 1253, from the Memorandum of Decision and Order of this Court on

November 14, 1974.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

Darrel K. Diamond
Assistant Attorney General

Offices of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6239

APPENDIX D
PUBLIC LAW 336

SECTION 1. IC 1971, 35-30 is amended by adding a new chapter to be numbered 10.5 and to read as follows:

Chapter 10.5. Nuisance-Pornographic.

Sec. 1. As used in this chapter: (a) "Place" includes any building, structure or any separate part or portion thereof or the ground itself.

(b) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee,

(c) 'Personal property", as used in this chapter, means any lewd, indecent, lascivious, or obscene film or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, glass slides, either in negative or positive form designed for exhibition by projection or viewing, except the personal tools of trade of an employed projectionist;

(d) "Nuisance" means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such

place for any such purpose. This chapter shall not affect any newspaper magazine, or other publication entered as second class matter by the postoffice department.

Sec. 2. Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3 to 6 inclusive of this chapter.

Sec. 3. Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a resident of such county may bring an action to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than one thousand dollars ($1,000), to secure to the party enjoined the damages he may sustain if such is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance in such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action. A person, other than the prosecuting attorney or attorney general, who so institutes an action and executes a

bond shall have a right to recover such bond and reasonable attorney's fees incurred by him in trying the action, if the existence of a nuisance is admitted or established in an action as provided in this chapter. Provided that, attorney's fees shall not be recovered in any case in which the prosecuting attorney, attorney general, or any of their deputies have acted as attorneys in such action.

Sec. 4. The action, provided is section 3 of this chapter, shall be brought in the circuit or superior court of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the circuit court.

After the filing of the petition, application for a temporary injunction may be made to the court who shall grant a hearing within ten (10) days after the filing. Where such application for a temporary injunction is made, the court may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and

contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five (5) days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing, the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five (5) days' notice of the hearing and unless such person shows to the satisfaction of the court that the nuisance complained of is abated, the court shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall

be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property, with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court is rendered on the application for a permanent injunction, then the court, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

Sec. 5. The action, provided for in sections 3 and 4 of this chapter, shall be set down for trial without delay and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any

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such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charges with maintaining said nuisance. If the complaint is filed by a person who is a resident of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than once, any person who is a resident of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a resident of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

Sec. 6. If the existence of a nuisance is admitted or established in an action as provided in this chapter, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of the personal property and contents used in conducting the nuisance, and not already released under

authority of the court as provided in section 4 of this chapter, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Obscene materials as referred to in Sec. 1 (c) of this chapter shall be confiscated and destroyed. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 4 of this chapter, or, if not so furnished shall continue for one (1) year any closing order issued at the time of granting the temporary injunction, or if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for further maintaining the nuisance at the place, and keeping it closed for a period of one (1) year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 4 of this chapter. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owner of unsold personal property and contents so seized must appear and claim the same within ten (10) days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling

like property on execution, and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

Sec. 7. In case of the violation of any injunction or closing order, granted under this chapter, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

Sec. 8. Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars ($300). Such tax may not be imposed upon the personal property or against the owner thereof who was found innocent as provided in section 6 of this chapter, or upon the real property or against the owner thereof who shows to the satisfaction of the court at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return of the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed as when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve

the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be paid to the county treasurer.

Sec. 9. When a nuisance is found to exist in any proceeding under this chapter, and the owner or agent of such place whereon the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollard ($300) imposed under section 8 if this chapter, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein, and existing laws regarding the service of process, shall apply to service in proceedings under this chapter. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property

affected by the action." Service thereon may be had by publication in the manner prescribed in IC 1971, 34-5-1.1. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make defense thereto and have trial of his rights in the premises by the court, and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

Sec. 10. In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall proceed promptly, under this chapter, to enforce this chapter, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under this chapter shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 6 of this chapter shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 7 to 10, inclusive of this chapter.

SECTION 2. IC 1971, 35-30-2 insofar as it is inconsistent with this act is hereby specifically repealed.

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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1165

THE HONORABLE THEODORE L. SENDAK,
in his capacity as Attorney General
of the State of Indiana,

Appellant

VS.

CLYDE NIHISER, d/b/a Movieland Drive-
In Theater,

Appellee

Appeal from the United States District
Court for the Northern District of
Indiana, Fort Wayne Division

MOTION TO AFFIRM

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed, on the ground that the question raised is so unsubstantial as not to warrant further Argument.

I.

Statement of the Case and The Proceedings Below

This is a direct appeal from the final judgment and decree entered on November 14, 1974, by a District Court of three judges,[1] specially constituted pursuant to 28 U.S.C., §2281 and §2284, declaring the Indiana Nuisance Statute, I.C. 35-30-10.5, unconstitutional under the First and Fourteenth Amendments to the United States Constitution and enjoining its enforcement.

On October 18, 1973, Clyde Nihiser, d/b/a Movieland Drive-In Theater, brought this action in the United States District Court for the

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[1]Judge Beamer indicated an intention to approve the holding of the decision, but died on October 21, 1974, before the opinion was drafted.

Northern District of Indiana, Fort Wayne Division, seeking a temporary and permanent injunction to restrain state defendants from proceeding under Public Law 336 of the 1973 Acts of the Indiana General Assembly, I.C. 35-30-10.5, commonly referred to as the Indiana Nuisance Statute. The Indiana Nuisance Statute provides procedures for declaring a place which produces or displays obscene films a nuisance.

Injunctive relief was sought under the provisions of 42 U.S.C.A., §1983; 28 U.S.C.A., §1331; 28 U.S.C.A., §1343;28 U.S.C.A., §2284(3); and Rule 65, Fed.R.Civ.P.

Clyde Nihiser also sought to have the Indiana Nuisance Statute declared unconstitutional, alleging jurisdiction for relief upon 28 U.S.C.A., §2201, §2202, and Rule 57, Fed.R.Civ.P.

On June 4, 1974, the District Court entered a Memorandum of Decision and Order, denying the Motion to Dismiss and Motion to Strike filed by the State defendants.

On July 25, 1974, Clyde Nihiser filed a Motion for Summary Judgment, based upon the record of the case to that point. The State defendants filed no affidavits contesting the Motion for Summary Judgment. On November 14, 1974, the District Court entered its final judgment in the case, incorporating by reference the Memorandum of Decision and Order, dated June 4, 1974.

II.

Argument

The Case Presents No Substantial Question Not Previously Decided by This Court.

In the Jurisdictional Statement filed by Appellant, the sole question

presented to this Court is one of abstention, and is found at page 4 of that brief. Although the question is stated:

> "Whether the District Court erred in refusing to abstain in a case involving a state statute which has never been construed by state courts, but rather giving that statute a strained and unrealistic interpretation which would make the statute unconstitutional.",

it presents a simple question of abstention, which has already been answered many times by this tribunal. The words, ". . . but rather giving that statute a strained and unrealistic interpretation which would make the statute unconstitutional," constitute a naked allegation unsupported by the record in this case or any law cited by appellant, for the apparent purpose of flavoring the question with some additional characteristic which would distinquish it in some way from previous

decisions of this Court covering the basic question which appellant raises.

It is the position of the appellee that the District Court properly refused to abstain in the case at bar. This Court has held that abstention is inappropriate in a case where the state statute is justifiably attacked on its face as abridging free expression, or as applied for the purpose of discouraging protected activities. [Dombrowski v. Pfister, 380 U.S. 479 (1965).]

In Zwickler v. Koota, 389 U.S. 241 (1967), this Court held that where the state statute is attacked as void for overbreadth and is not fairly subject to a limiting interpretation that will avoid or modify the federal constitutional problem, abstention is improper.

The record in this cause reflects an attack on the Indiana Nuisance

Statute because it does, on its face, constitute an abridgment of free expression under the First and Fourteenth Amendments to the United States Constitution; and, further attacks the statute as being over-broad under the 1973 decision of this Court in Miller v. California, 413 U.S. 15.

Appellee would further urge that the District Court was proper in its determination that the overbreadth of the statute was not subject to a limiting interpretation that would avoid or modify the federal constitutional problem, since the Indiana Supreme Court had already refused to so construe similar language in corresponding criminal statutes as exists in the Indiana Nuisance Statute.[2]

[2]See Mohney v. State, ___Ind.___, 300 N.E.2d 66 (1973); and Stroud v. State, ___Ind.___, 300 N.E.2d 100 (1973).

Lake Carrier Association v. MacMullen, 406 U.S. 498 (1972), and Harrison v. N.A.A.C.P., 306 U.S. 167 (1959), cited in the Jurisdictional Statement, are not controlling, since the challenged statute is not capable of a construction by the state court which would avoid or modify the federal constitutional questions involved. This is so because the statutory scheme involved therein is flagrantly and patently violative of express constitutional prohibitions in practically every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to enforce it. [Watson v. Buck, 313 U.S. 387 (1941).]

Thus, appellee urges that the District Court was correct in finding the issues at bar to constitute "unusual

circumstances" which fit the case into an exception to the rule of Younger v. Harris, 401 U.S. 37, (1971) and, therefore, not a proper case for abstention.

III.

Conclusion

WHEREFORE, appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this cause by the United States District Court for the Northern District of Indiana, Fort Wayne Division.

Respectfully submitted,

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HERBERT W. JOHNSON, JR.

Attorneys for Appellee